

**Testimony of  
Neal A. McCaleb  
Assistant Secretary for Indian Affairs  
before the Committee on Indian Affairs  
United States Senate  
on the  
Hoopa-Yurok Settlement Act  
August 1, 2002**

Good morning. I am Neal McCaleb, and I serve as the Assistant Secretary of Indian Affairs for the Department of the Interior. I am pleased to be here before you today to report on the status of events subsequent to the passage of the Hoopa-Yurok Settlement Act (Settlement Act or Act) in 1988, Public Law 100-580, 25 U.S.C. section 1300i *et seq.*, as amended. Earlier this year, the Department submitted its Report to Congress (Report) pursuant to section 14 of the Act (25 U.S.C. § 1300i-11(c)).

**BACKGROUND**

**Establishment of Reservations**

As recognized in the legislative history of the Act, the attachments to the Report, and numerous other documents, the federal government set aside lands bisected by the Trinity and lower Klamath Rivers in the mid- to late-1800s, in accordance with statutes and executive orders, to establish what are known today as the Hoopa Valley and Yurok Indian Reservations. Based on an 1853 Act of Congress, President Pierce set aside the Klamath River Reservation by executive order in 1855. The reservation extended approximately 20 miles up the Klamath River from the Pacific Ocean and including lands one mile in width on either side of the river. Based on an 1864 Act of Congress and an 1864 proclamation by the Department, President Grant issued an executive order in 1876 which formally set aside the original Hoopa Valley Reservation, a 12-mile square reservation (the “Square”) bisected by the Trinity River and extending upstream from the Klamath-Trinity River confluence.

Because of some confusion about the effect of the two separate congressional acts and concern regarding the status of the original Klamath River Reservation, President Harrison issued another executive order in 1891 forming the extended or “joint” Hoopa Valley Reservation. The extended reservation, termed the “1891 Reservation” in the Report, encompassed the original Hoopa Valley Reservation, the Klamath River Reservation, and an additional strip of land down the Klamath River from the Klamath-Trinity confluence which connected the two reservations (“connecting strip”). Pursuant to section 2 of the Settlement Act, Congress partitioned the extended reservation between the two tribes.

## **Legal claims to the Reservation**

Prior to the Settlement Act, legal controversies arose over the ownership and management of the Square and its resources. Although the 1891 executive order joined the separate reservations into one, the Secretary had generally treated the respective sections of the reservations separately for administrative purposes. A 1958 Solicitor's opinion also supported this view. 62 I.D. 59, 2 Op. Sol. Int. 1814 (1958). In the 1950s and 1960s, the Secretary thus only distributed timber revenues generated from the Square to the Hoopa Valley Tribe and its members.

In 1963, Yurok and other Indians (eventually almost 3800 individuals) challenged this distribution, and the United States Court of Claims subsequently held that all Indians residing within the 1891 Reservation were "Indians of the Reservation" and were entitled to share equally in the timber proceeds generated from the Square. *Short v. United States*, 486 F.2d 561 (Ct. Cl. 1973) (per curiam), *cert. denied*, 416 U.S. 961 (1974). Following this decision, the Department began allocating the timber proceeds generated from the Square between the Yurok Tribe (70%) and the Hoopa Valley Tribe (30%). The 70/30 allocation was based upon the number of individual Indians occupying the Joint Reservation that identified themselves as members of either the Yurok Tribe or Hoopa Valley Tribe, respectively. Another lawsuit (*Puzz*) challenged the authority of the Hoopa Valley Business Council to manage the resources of the Square, among other claims. These and related lawsuits had profound impacts relating to tribal governance and self-determination, extensive natural resources that comprise valuable tribal trust assets, and the lives of thousands of Indians who resided on the Reservation.

## **1988 Settlement Act**

In order to resolve longstanding litigation between the United States, Hoopa Valley Tribe, and Yurok and other Indians regarding the ownership and management of the Square, Congress passed the Hoopa-Yurok Settlement Act in 1988. The Act did not disturb the resolution of prior issues through the *Short* litigation; rather, the Act sought to settle disputed issues by recognizing and providing for the organization of the Yurok Tribe, by partitioning the 1891 Joint Reservation between the Hoopa Valley and Yurok Tribes, and by establishing a Settlement Fund primarily to distribute monies generated from the Joint Reservation's resources between the Tribes. The testimony below discusses relevant sections of the Act with respect to current issues.

## **Partition**

Section 2 of the Act provided for the partition of the Joint Reservation. Upon meeting certain conditions in the Act, the Act recognized and established the Square as the Hoopa Valley Reservation, to be held in trust by the United States for the benefit of the Hoopa Valley Tribe; and the Act recognized and established the original Klamath River Reservation and the connecting strip (the

“extension”) as the Yurok Reservation, to be held in trust by the United States for the benefit of the Yurok Tribe.

In accordance with the conditions set in section 2(a), the Hoopa Valley Tribe passed Resolution No. 88-115 on November 28, 1988, waiving any claims against the United States arising from the Act and consenting to use of the funds identified in the Act as part of the Settlement Fund. The BIA published notice of the resolution in the Federal Register on December 7, 1988 (53 Fed. Reg. 49361). These actions had the effect of partitioning the joint reservation.

### **Settlement Fund**

Section 4 of the Act established a Settlement Fund which placed the monies generated from the Joint Reservation into an escrow account for later equitable distribution between the Hoopa Valley and Yurok Tribes according to the provisions of the Act. The Act also authorized a \$10 million federal contribution to the Settlement Fund, primarily to provide lump sum payments to any “Indian of the Reservation” who elected not to become a member of either Tribe.

As listed in section 1(b)(1) of the Act, the escrow funds placed in the Settlement Fund came from monies generated from the Joint Reservation and held in trust by the Secretary in seven separate accounts, including the Yurok 70% timber proceeds account and the Hoopa 30% timber proceeds account. The Secretary deposited the monies from these accounts into the Hoopa-Yurok Settlement Fund upon enactment of the Act. The Settlement Fund’s original balance was nearly \$67 million. At the beginning of Fiscal Year 2002, the Fund contained over \$61 million in principal and interest, even with previous distributions as described below. Appendix I to the Report provides relevant figures from the Fund.

### **Distribution of Settlement Fund**

The Act sought to distribute the monies generated from the Joint Reservation and placed into the Settlement Fund on a fair and equitable basis between the Hoopa Valley and Yurok Tribes. The Senate Committee Report briefly described what was then believed to be the rough distribution estimates for the Fund based on the settlement roll distribution ratios established in the Act: \$23 million (roughly 1/3 of Fund) would go to the Hoopa Valley Tribe pursuant to section 4(c); a similar distribution to the Yurok Tribe under section 4(d), as described below, assuming roughly 50% of those on the settlement roll would accept Yurok tribal membership; and the remainder to the Yurok Tribe after individual payments discussed below. *See* S. REP. NO. 564, 100<sup>th</sup> Cong., 2d Sess. 20, 25 (1988).

Substantial distributions have already been made from the Settlement Fund in accordance with the Act. The Department disbursed to the Hoopa Valley Tribe just over \$34 million between passage of the Act and April 1991, the total amount determined by the BIA to be the Tribe’s share under section 4(c) of

the Act. The Department also distributed \$15,000 to each person on the settlement roll who elected not to become a member of either Tribe under section 6(d) of the Act. Approximately 708 persons chose the “lump sum payment” option for a total distribution for this purpose of approximately \$10.6 million, exceeding the \$10 million federal contribution authorized under the Act for this payment.

Section 4(d) of the Act provided for the Yurok Tribe’s share of the Settlement Fund, similar to the determination of the Hoopa Valley Tribe’s share under section 4(c). Section 7(a) further provided that the Yurok Tribe would receive the remaining monies in the Settlement Fund after distributions were made to individuals in accordance with the settlement/membership options in section 6 and to successful appellants left off the original settlement roll under section 5(d). Section 1(c)(4), however, conditioned the Hoopa Valley Tribe’s and Yurok Tribe’s receipt of these monies, requiring the Tribes to adopt a resolution waiving any claim against the United States arising from the Act. The Hoopa Valley Tribe adopted such a resolution but the Yurok Tribe did not.

In November 1993, the Yurok Tribe passed Resolution 93-61 which purported to waive its claims against the United States in accordance with section 2(c)(4). The Tribe, however, also brought suit alleging that the Act effected a constitutionally prohibited taking of its property rights, as described below. In effect, the Tribe sought to protect its rights under section 2 of the Act to its share of the Settlement Fund and other benefits while still litigating its claims as contemplated in section 14 of the Act. By letter dated April 4, 1994, the Department informed the Tribe that the Department did not consider the Tribe’s “conditional waiver” to satisfy the requirements of the Act because the “waiver” acted to preserve, rather than waive, its claims.

### **TAKINGS LITIGATION**

Instead of similarly waiving its claims as the Hoopa Valley Tribe did, the Yurok Tribe--as well as the Karuk Tribe and individual Indians--brought suit against the United States alleging that the Act constituted a taking of their vested property rights in the lands and resources of the Hoopa Valley Reservation contrary to the 5<sup>th</sup> Amendment to the U.S. Constitution. In general, the complaints argued that the 1864 Act authorizing Indian reservations in California or other Acts of Congress vested their ancestors with compensable rights in the Square. Alternatively, plaintiffs argued that their continuous occupation of the lands incorporated into the Reservation created compensable interests. Potential exposure to the U.S. Treasury was once estimated at close to \$2 billion. This litigation began in the early 1990s and only recently ended.

The United States Court of Federal Claims and the Federal Circuit Court of Appeals disagreed with the positions of the Yurok Tribe and other plaintiffs. *Karuk Tribe et al. v. United States et al.*, 41 Fed. Cl. 468 (Fed. Cl. 1998), *aff’d*, 209 F.3d 1366 (Fed. Cir. 2000) (2-1 decision). The federal courts generally followed the reasoning provided in the Committee Reports to the bills ultimately enacted as the Settlement Act. *See* S. REP. NO. 564, *supra*, at 9-11; H.R. REP. NO. 938, 100<sup>th</sup> Cong., 2d Sess. 15-16 (1988). “Unless recognized as vested by some act of Congress, tribal rights of

occupancy and enjoyment, whether established by executive order or statute, may be extinguished, abridged, or curtailed by the United States at any time without payment of just compensation.” *Karuk Tribe et al. v. United States et al.*, 41 Fed. Cl. at 471 (citing, *inter alia*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79 (1955) and *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103-04 (1949)); *see also* 209 F.3d at 1374-76, 1380. The courts concluded that no Act of Congress established vested property rights in the plaintiffs or their ancestors to the Square; rather the statutes and executive orders creating the Reservation allowed permissive, not permanent, occupation. Thus, courts held the Act did not violate the Takings Clause.

Plaintiffs petitioned the U.S. Supreme Court for a writ of *certiorari* to review the lower court decisions. On March 26, 2001, the Court denied *certiorari*, thereby concluding this litigation. 532 U.S. 941 (2001).

### **DEPARTMENTAL REPORT**

Section 14(c) of the Act provides that the Department shall submit to Congress a Report describing the final decision in any legal claim challenging the Act as effecting a taking of property rights contrary to the 5<sup>th</sup> Amendment to the U.S. Constitution or as otherwise providing inadequate compensation. The Supreme Court’s denial of *certiorari* triggered this provision.

The Department solicited the views of the Hoopa Valley and Yurok Tribes regarding future actions of the Department with respect to the Settlement Fund and the Report required under the Act. The Report briefly describes issues both leading up to and subsequent to the Act, attaches the written positions of the Tribes, and provides recommendations of the Department for further action with respect to the Settlement Fund.

### **Hoopa Position**

In July 2001, the Hoopa Valley Tribe submitted its proposed draft report for consideration by the Department. After describing the history of the disputes, the Settlement Act, and subsequent actions, the Hoopa Valley Tribe provided various recommendations and observations.

The Hoopa’s submission noted that a separate lawsuit determined that only 1.26303 percent of the Settlement Fund monies were derived from the Yurok Reservation, with the remainder of the monies derived from the Hoopa Reservation. “The Hoopa Valley Tribe has continued to assert its right to a portion of the benefits offered to and rejected by the Yurok Tribe.” *Id.* at 16. Prior to its July submission, the Tribe previously requested that the Department recommend “that the remaining funds from the Hoopa Square be returned to the Hoopa Valley Tribe.” *Id.*

The Hoopa’s submission ultimately suggested the following recommendations:

–that the “suspended benefits” under the Act—including the land transfer and land acquisition provisions for the Yurok Tribe and the remaining monies in the Settlement Fund--“be valued and divided equally between the two tribes”;

–that the economic self-sufficiency plan for the Yurok Tribe be carried forward, including “any feasibility study concerning the cost of a road from U.S. Highway 101 to California Highway 96 . . . and other objectives of the self-sufficiency plan”;

–that additional federal lands adjacent to or near the Yurok and Hoopa Valley Reservations be conveyed to and managed by the respective Tribes.

## **Yurok Position**

In August 2001, counsel for the Yurok Tribe submitted the Tribe’s positions and proposed draft report. The Yurok Tribe’s submission similarly outlined the history of the dispute, other considerations, and its recommendations for the Department to consider. In general, the Yurok Tribe takes the position, among others, that its “conditional waiver” was valid and became effective upon the Supreme Court’s denial of *certiorari* in the takings litigation.

The Yurok’s submission discusses the Tribe’s concerns with the process leading up to and ultimately resulting in passage of the Settlement Act. In the Tribe’s view, the Act “nullified in large part the *Short* ruling” which allowed all “Indians of the Reservation” to share equally in the revenues and resources of the Joint Reservation. The Tribe, not formally organized at the time, “was not asked and did not participate in the legislative process” and had the Act “imposed on the Yuroks who . . . were left with a small fraction of their former land and resources.” In its view, the Act divested the Yurok Tribe of its “communal ownership” in the Joint Reservation’s lands and resources and “relegated the much larger” Tribe to a few thousand acres in trust along the Klamath River with a decimated fishery while granting to the Hoopa Valley Tribe nearly 90,000 acres of unallotted trust land and resources, including valuable timber resources.

With respect to the waiver issue, the Yurok’s submission considers the Department’s view, discussed above, as erroneous. The Tribe references a March 1995 letter from the Department in which the Assistant Secretary-Indian Affairs indicated that the Tribe could cure the “perceived deficiencies” with its “conditional waiver” by “subsequent tribal action or the final resolution of the Tribe’s lawsuit in the U.S. Court of Federal Claims.” The Tribe takes the position that it made a reasonable settlement offer and would have dismissed its claim with prejudice, but that the Department never meaningfully responded. Now, the Tribe considers the Supreme Court’s denial of *certiorari* as the “final resolution” suggested as curing the waiver.

As support for its position, the Tribe states: “The text of the Act and the intent of Congress make clear that filing a constitutional claim and receiving the benefits of the Act are not mutually exclusive.” The Tribe suggests that principles of statutory construction, including the canon that ambiguities be resolved in favor of tribes and that provisions within a statute should be read so as not to conflict or be inconsistent, requires a broader reading of the waiver provision in section 2(c)(4) in light of the Act’s provision allowing a taking claim to be brought under section 14. The Tribe considers the Department’s reading of the statute to be unfair and unjust. For these and other reasons, the Tribe is of the view that it is now entitled to its benefits under the Act.

## **Departmental View**

Because the Yurok Tribe litigated its claims against the United States based on passage of the Act rather than waiving those claims, the Department is of the view that the Yurok Tribe did not meet the condition precedent established in section 2(c)(4) of the Act for the Tribe to receive its share of the Settlement Fund or other benefits. But, the Department is also of the view that the Hoopa Valley Tribe has already received its portion of the benefits under the Act and is not entitled to further distributions from the Settlement Fund under the provisions of the Act.

Ultimately, this situation presents a quandary for the Department and for the Tribes, as we believe the Act did not contemplate such a result. The monies remaining in the Settlement Fund originated from the seven trust accounts which held revenues generated from the Joint Reservation. Thus, the monies remaining in the Settlement Fund should thus be distributed to one or both Tribes in some form. Moreover, the Department recognizes that substantial financial and economic needs currently exist within both Tribes and their respective reservations.

Given the current situation, the Report outlines five recommendations of the Department to address these issues:

First, no additional funds need to be added to the Settlement Fund to realize the purposes of the Act;

Second, remaining monies in the Settlement Fund should be retained in trust account status by the Department pending further considerations and not revert to the general fund of the U.S. Treasury;

Third, the Settlement Fund should be administered for the mutual benefit of both Tribes and their respective reservations, taking into consideration prior distributions to each Tribe from the Fund. It is our position that it would be inappropriate for the Department to make any general distribution from the Fund without further instruction from Congress;

Fourth, Congress should fashion a mechanism for the future administration of the Settlement Fund, in coordination with the Department and in consultation with the Tribes; and,

Fifth, Congress should consider the need for further legislation to establish a separate, permanent fund for each Tribe from the remaining balance of the Settlement Fund in order to address any issue regarding entitlement to the monies and to fulfill the intent of the Settlement Act in full.

This concludes my testimony. I would be happy to respond to any questions you may have.